

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-201133.2, B-201133.3 DATE: June 22, 1981

FOIAB2

MATTER OF: Central Intelligence Agency, National
Office Systems, Inc.--Request for
Reconsideration

OGC

DIGEST:

DDA REGISTRY

FILE: Equip + Supplies

1. Request for reconsideration by agency of protest decision filed more than 10 working days after agency received decision is untimely even though agency's procurement division did not receive decision until 5 working days later.
2. Contention that order for supplies cannot be placed directly with authorized agent of Federal Supply Schedule contractor is denied on reconsideration since agency's delivery order was issued directly to contractor and only "in care of" contractor's authorized agent.

The Central Intelligence Agency (CIA) and National Office Systems, Inc. (National), request reconsideration of our decision in National Office Systems, Inc., B-201133, March 18, 1981, 81-1 CPD 210.

National had contended that the CIA's purchase from the Federal Supply Schedule of eight power shelving units manufactured by Kardex Systems, Inc. (Kardex), was tainted because CIA procurement officials favored the use of Kardex equipment over the White Machine Company equipment offered by National. In our prior decision, we held that the CIA's requirements for eight power files containing a self-diagnostic feature were in contravention of the Federal Property Management Regulations, which prohibit purchases made at prices other than the lowest delivered price on the basis of "mere personal preference."

The CIA

The CIA argues that the determination that eight units and a self-diagnostic feature were required was the responsibility of the procuring agency. The Agency

B-201133.2
B-201133.3

2

asserts that National was aware that eight units were necessary, and the record does not demonstrate that National met the burden of showing that eight units were not needed. As to the requirement for the self-diagnostic feature, the CIA contends that this feature supports the Agency's need to have continuous access to the file because it identifies system operation problems that the file operator can correct and that adequate documentation was provided to this Office to establish prima facie support for contention.

The CIA's request for reconsideration is untimely and therefore dismissed.

Our Bid Protest Procedures, 4 C.F.R. § 20.9(b) (1980), require that requests for reconsideration by the agency be filed within 10 working days after the basis for reconsideration is known or should have been known.

The CIA's request for reconsideration of our prior decision of March 18, 1981, which was forwarded to the Director, CIA, by letter of that date, was received by this Office on April 10, 1981. In the request, the CIA states that since the Procurement Division of the Office of Logistics received our prior decision on March 27, 1981, its request which was hand-delivered to this Office on April 10, 1981, the tenth day after receipt by that office, is timely. However, in telephone conversations on March 31 and April 3, 1981, with attorneys in this Office, the Chief of the CIA's Procurement Division stated that our decision was received by the Agency on March 20, 1981, which we believe is the date when the basis for reconsideration was known or should have been known.

The fact that the CIA's Office of Logistics did not receive our prior decision until March 27, 1981, is of no consequence. We have held that the failure of a protester's officer with authority to bind the protester to receive actual notification of a basis for protest until 2 days after the protester's corporate headquarters was so notified did not toll the 10 working day period for submission of a timely protest with this Office. See Better Business Machines, B-191715, August 9, 1978, 78-2 CPD 107.

B-201133.2
B-201133.3

3

Timeliness standards for the filing of requests for reconsideration are even more inflexible than those for filing protests. See Department of Commerce; International Computaprint Corporation, 57 Comp. Gen. 615 (1978) 78-2 CPD 84. We see no reason then to apply a less stringent standard to an agency's request for reconsideration. Therefore, the Agency's April 10, 1981, request for reconsideration was not filed within the time limits set forth in 4 C.F.R. § 20.9(b).

National

National requests that we reconsider our decision that the CIA's award directly to Remco Business Systems, Inc. (Remco), an agent of Kardex, without any reference to Kardex was contrary to the Federal Supply Schedule procurement procedures established by the General Services Administration. In addition, National asserts that the order for the shelving units must be issued to Kardex alone, although it can be mailed or sent to any of its authorized dealers such as Remco.

In our prior decision we stated:


"National's last basis for protest is that award to Remco was improper since the Federal Supply Schedule contract was between Kardex and the General Services Administration. However, since Remco was listed as an authorized agent for Kardex under Kardex's Federal Supply Schedule contract, this issue of protest is denied."

The above denial was correctly based on the fact that the CIA issued a delivery order under this schedule for the eight Kardex power shelving units to Kardex in care of Remco. GSA has informally confirmed that award in this manner is proper. Therefore, National's contention on this point is again denied.

B-201133.2
B-201133.3

4

Our prior decision is affirmed.


Acting Comptroller General
of the United States

Declassified in Part - Sanitized Copy Approved for Release 2012/07/11 : CIA-RDP84B00890R000200050014-8

OGC

Page Denied

Next 6 Page(s) In Document Denied

STAT

Declassified in Part - Sanitized Copy Approved for Release 2012/07/11 : CIA-RDP84B00890R000200050014-8

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-201133

DATE: March 18, 1981

MATTER OF: National Office Systems, Inc.

DIGEST:

1. Purchases from Federal Supply Schedule must be made from source offering lowest delivered price unless purchase of higher priced item is fully justified by agency in accord with FPMR § 101-26.408-2. In present case, agency decision to buy from other than lowest priced Federal Supply Schedule source is not justified as required by FPMR § 101-26.408-2 where internal memorandum from using activity clearly indicates that lower priced source would fulfill minimum needs, and agency does not dispute that lower priced source has equivalent feature. Therefore, protest is sustained.
2. Protest that award was made to firm which did not have Federal Supply Schedule contract is denied since awardee was listed on Federal Supply Schedule as authorized agent of firm which had such contract.

National Office Systems, Inc. (National), a manufacturer's agent representing White Machine Company, has protested against the Central Intelligence Agency's (CIA) purchase from the Federal Supply Schedule of eight Lektriever Series 80 power shelving units, manufactured by Kardex Systems, Inc. (Kardex), from Remco Business Systems, Inc. (Remco).

National alleges that the entire procurement process was tainted because CIA procurement officials favored the use of Kardex equipment over the White

B-201133

2

Machine Company equipment offered by National. National alleges that the agency's essential technical requirements were overly restrictive and derived from Kardex advertising brochures to ensure that only Kardex equipment would meet the agency's minimum needs. National also challenges the purchase from Remco because the purchase was made from the Federal Supply Schedule and Kardex, not Remco, has the Federal Supply Schedule contract with the General Services Administration.

The protest is sustained in part and denied in part.

The protested procurement actions took place over a period of approximately 2 years in two phases. During the first phase, National dealt with the CIA's Office of Medical Services which needed to replace its existing mechanized storage filing system. National examined the existing mechanized storage file system and discussed the requirement with Office of Medical Services staff on several occasions. The CIA personnel indicated that eight mechanized files would be needed. National tried unsuccessfully to persuade CIA staff members that its equipment had a significantly larger capacity than the old files and could surpass Office of Medical Services minimum capacity requirements with just seven file units. In January 1979, National submitted a quotation based on eight power file units and an alternate quotation on seven. National submitted another quotation in April 1979, based upon eight newer, larger capacity filing units.

The second phase began in June 1979, when the CIA's Office of Medical Services requisitioned eight power shelving units with a 12,000-inch total shelving capacity from the CIA's Procurement Division. The requisitioner from the Office of Medical Services requested that award be made to Remco on a sole-source basis. The contracting officer determined that a sole-source award was not justified since mechanized filing units were available from the Federal Supply Schedule under contracts between several commercial vendors and the General Services Administration. Accordingly, in

B-201133

3

July 1980, the contracting officer solicited and received price proposals for a mechanized file system and installation from three firms listed on the Federal Supply Schedule, including National.

The contracting officer notified the requisitioner that he was about to make an award to the lowest priced offeror. Subsequently, the requisitioner identified four previously unstated "essential minimum technical requirements" to be satisfied, including one that the power file system have an "electronic self-diagnostic feature" for pinpointing trouble areas in case of system malfunction. The three proposers responded to the new requirements in early September 1980. Since the Kardex files had this feature and despite National's protest to the CIA Procurement Division on September 8, 1980, that the self-diagnostic feature was not essential, the contracting officer determined that award to Remco for Kardex equipment was justified even though the price was not the lowest on the Federal Supply Schedule. On September 29, 1980, orders for the purchase and installation of eight Kardex power files were issued to Remco.

The CIA reports that the self-diagnostic feature (a series of indicator lights to continually monitor all safety systems) is designed to deactivate the mechanized file unit in case of malfunction, and the indicator lights automatically tell the machine operator where to take corrective action. The CIA argues this system is necessary because it reduces system downtime and repair time. National argues that the feature will not help the machine operator take corrective action because only an authorized repairman can make repairs without voiding warranties on the equipment.

Purchases from the Federal Supply Schedule are governed by the Federal Property Management Regulations (FPMR), 41 C.F.R. part 101-26.4 (1980), which provide in part as follows:

"§ 101-26.408-2 Procurement at lowest price.

"Each purchase of more than \$500
per line item made from a multiple-award

B-201133

4

schedule by agencies required to use these schedules shall be made at the lowest delivered price available under the schedule unless the agency fully justifies the purchase of a higher priced item. * * *

"§ 101-26.408-3 Justifications.

"(a) Justifications of purchases made at prices other than the lowest delivered price available should be based on specific or definitive needs which are clearly associated with the achievement of program objectives. Mere personal preference cannot be regarded as an appropriate basis for a justification. Justifications should be clear and fully expressed. * * *"
(Emphasis added.)

These clauses require Federal agencies which procure from a multiple-award Federal Supply Schedule to do so at the lowest price consistent with their minimum needs. Determinations as to the needs of an agency and which products on the Federal Supply Schedule meet those needs are matters primarily within the jurisdiction of the procuring agency and with which we will not interfere unless they involve bad faith or are not based on substantial evidence. Thus, once the procuring agency determines its minimum needs, it is required to procure from the lowest priced supplier on the schedule, unless it makes an appropriate justification for purchase from a higher priced supplier. Our Office does not believe a legal objection to the agency's determinations is warranted unless those determinations are shown to be unreasonable. See Quest Electronics, B-193541, March 27, 1979, 79-1 CPD 205.

The CIA's justification for rejecting National's proposal was the failure of that proposal to contain an automatic, self-diagnostic feature. The CIA supplied our Office with its entire contract file including an internal memorandum from the Medical

B-201133

5

Requirements Officer, Registrar and Services Staff, Office of Medical Services, dated May 23, 1980, dealing with the filing needs of the Office of Medical Services and the proposals received from the three offerors. This memorandum states: "In view of the overall technology exhibited by all three vendor units, it appears that any one would fulfill OMS requirements." Moreover, this document indicates that, even though proposals were solicited for eight power file units, National's new, larger power files might be able to fulfill the minimum needs with as few as six power file units and that National's price per filing inch was lower than Remco's when using the newer models. In spite of the above findings, the Medical Requirements Officer recommended ordering the replacement files from Remco because "Remco Business Systems offers the best and most complete 'A' to 'Z' services."

The CIA has not adequately explained why the self-diagnostic feature was added as a minimum essential requirement other than a general statement that such a feature would help to reduce machine downtime. The CIA has not explained the discrepancy between the requirement for such feature and the Medical Requirements Officer's statement that National's equipment would fulfill the using activity's needs. Moreover, National points out that its offered equipment has a light emission diode safety indicator which would perform essentially the same function as Remco's self-diagnostic feature. The CIA has not responded to this argument. Our review of National's advertising brochure (supplied by the CIA) shows that such a feature is displayed prominently, but it is unclear from the brochure what function this feature would perform. However, it appears that CIA procurement personnel did not question National about this safety feature to ascertain its function even though a self-diagnostic feature had been made an essential requirement. We note that the self-diagnostic feature offered by Remco is labeled a "Safety Status Panel" which at least appears to be similar in function to the feature offered by National.

B-201133

6

Another document supplied by the CIA is an abstract of proposals compiled by the CIA on September 26, 1980, just 3 days before award to Remco. This document shows that National submitted three proposals based upon: (1) eight newer, larger units, (2) seven newer, larger units, and (3) eight of its older file units. This abstract shows that National's offers could have saved the Government as much as \$12,620, or as little as \$5,266, depending upon which proposal was accepted. However, all of National's offers were labeled "Non-compliant" for failing to have a self-diagnostic feature, and award was made to Remco at a price of \$65,440. The CIA has provided no justification for its requirement that eight power units be offered, even though its internal memorandum shows that seven of National's power units might fulfill the CIA's needs.

Based upon the foregoing facts, we find that the CIA's requirements for eight power files containing a self-diagnostic feature were based on "mere personal preference" in contravention of FPMR § 101-26.408-3. Moreover, since National states that its equipment has a feature equivalent to the self-diagnostic feature which the CIA does not dispute, and the CIA rejected National's lower priced offer as noncompliant, we find that the CIA's justification for award to Remco was not based upon substantial evidence and was, therefore, unreasonable. Accordingly, this point of National's protest is sustained.

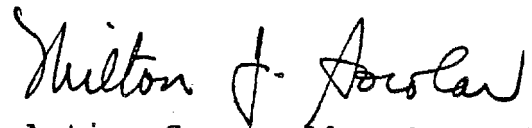
National's last basis for protest is that award to Remco was improper since the Federal Supply Schedule contract was between Kardex and the General Services Administration. However, since Remco was listed as an authorized agent for Kardex under Kardex's Federal Supply Schedule contract, this issue of protest is denied.

While we are sustaining National's protest on the basis that the CIA's justification for awarding to Remco at a higher price was unreasonable, we cannot recommend corrective action since the CIA has

B-201133

7

informed us that Remco has already delivered and installed all equipment ordered. However, we are notifying the Director of the CIA of our findings in an attempt to prevent similar improprieties in future procurements.

A handwritten signature in dark ink, appearing to read "Milton J. Arosen". The signature is fluid and cursive, with the first name "Milton" being the most prominent.

Acting Comptroller General
of the United States

Page Denied



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-201133

March 18, 1981

FOIAB2

OGC

Admiral William Casey
Director
Central Intelligence Agency

Dear Admiral Casey:

Reference is made to a report to our Office dated December 22, 1980, and subsequent correspondence, from the [redacted]

[redacted] reported on the protest of National Office Systems, Inc., concerning the purchase of eight power shelving units from Remco Business Systems, Inc., off the Federal Supply Schedule under purchase order No. 03200001.

Enclosed is a copy of our decision of today sustaining the protest in part and denying the protest in part. We wish to call your attention to that portion of the decision which concludes that the requirements of Federal Property Management Regulations, part 101-26.4, were not fully complied with because the justification for award to Remco Business Systems, Inc., was not based upon substantial evidence. We suggest that this information be brought to the attention of the procurement personnel involved with a view towards attempting to preclude a repetition of similar difficulties in future procurements.

Sincerely yours,

A handwritten signature in cursive script, reading "Milton F. Aorstan".

Acting Comptroller General
of the United States

Enclosure

5 M

Page Denied

Next 1 Page(s) In Document Denied

Declassified in Part - Sanitized Copy Approved for Release 2012/07/11 : CIA-RDP84B00890R000200050014-8

THE DIRECTOR OF
CENTRAL INTELLIGENCE

National Intelligence Officers

Declassified in Part - Sanitized Copy Approved for Release 2012/07/11 : CIA-RDP84B00890R000200050014-8